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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In re:

City of Port St. Joe, Florida

Permit No. FL 0020206  
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NPDES Appeal No. 93-9

[Decided January 11, 1994]

***ORDER DISMISSING APPEAL***

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

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## **CITY OF PORT ST. JOE, FLORIDA**

NPDES Appeal No. 93-9

### **ORDER DISMISSING APPEAL**

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Decided January 11, 1994

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#### **Syllabus**

The City of Port St. Joe, Florida, has petitioned for review of what it considers to be a "de facto denial" of its evidentiary hearing request by U.S. EPA Region IV in an NPDES permit proceeding. The Region, after receiving an evidentiary hearing request on a final permit decision issued to the City, withdrew the permit and reopened proceedings to issue a new permit. It is the Region's issuance of a new draft permit which the City asserts is a "de facto denial" of its evidentiary hearing request on the previous permit. The denial of an evidentiary hearing is subject to an appeal to this Board under 40 C.F.R. § 124.91(a).

Held: The petition for review is dismissed because the Region's action in withdrawing the previous permit has mooted any issue relative to that permit, including the evidentiary hearing request. The withdrawal itself was clearly authorized by 40 C.F.R. § 124.60(b), which provides that a permit may be withdrawn "any time prior to rendering of an initial decision in a formal hearing on a permit." Further, since there is no longer an EPA permit for the Board to review, the Board no longer has jurisdiction to hear the appeal.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

#### ***Opinion of the Board by Judge Reich:***

##### **I. BACKGROUND**

The City of Port St. Joe, Florida, has petitioned for review of what it has characterized as a "de facto denial" of its evidentiary hearing request by U.S. EPA Region IV in an NPDES permit proceeding. A denial of an evidentiary hearing request may be appealed to the Board pursuant to 40 C.F.R. § 124.91(a).

The essential facts of this matter are not in dispute. On March 17, 1988, the City requested a modification of its 1987 NPDES permit for its wastewater treatment plant. After consideration of this request, the Region advised the City that it intended to revoke and reissue the permit and requested submission of a new permit application. The City submitted this application on January 27, 1989, and a draft permit was noticed on April 19, 1990. The City submitted comments on the draft, a final permit decision was issued by the Region on August 16, 1990, and the City filed a timely request for an evidentiary hearing pursuant to 40 C.F.R. § 124.74(a) on September 14, 1990. The Region neither expressly granted nor denied this request. It is this request which the City asserts has been "de facto" denied.

On September 22, 1993, the Region advised the City that the Region was "hereby withdrawing" the NPDES permit issued on August 16, 1990, pursuant to

40 C.F.R. § 124.60(b),<sup>1</sup> and planned to issue a new draft permit for public comment.<sup>2</sup> Public notice of the new draft permit was given on September 30, 1993.<sup>3</sup> The original comment period was to close on October 29, 1993, but was extended to November 30, 1993.<sup>4</sup>

On October 26, 1993, the Board received the City's petition for review. The petition asserts that "[a]lmost all of the factual and legal issues raised by the City in the 1990 evidentiary hearing request remain applicable in the 1993 draft permit." Petition for Review, at 2. The City further states that "[t]he issuance of this new draft permit constitutes a de facto denial of the City's 1990 request for evidentiary hearing." *Id.* The City argues that it has been prejudiced by the Region's action as follows:

Had the hearing been granted three years ago (or the hearing denied and ultimately appealed), the majority of issues which must now be readdressed in response to the new 1993 draft permit would have been resolved. By failing to grant or deny a hearing, and then reissuing a new draft permit three years later, the City must now renew all comments, recompile and update data and expend significant resources to meet the procedural requirements necessary to return itself to the very place it was three years ago.

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<sup>1</sup> 40 C.F.R. § 124.60(b) provides in part that:

The Regional Administrator, at any time prior to the rendering of an initial decision in a formal hearing on a permit, may withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part.

<sup>2</sup> Letter of September 22, 1993, from W. Ray Cunningham, Director, Water Management Division to Mayor Frank Pate, Jr. (Exhibit 3 to Region's Response).

<sup>3</sup> Exhibit 4 to Region's Response.

<sup>4</sup> In its Response, the Region asserts that the decision to withdraw the subject permit and issue a new draft permit was taken (at least in part) to allow the City to submit additional information on the facility not contained in the administrative record. Region's Response, at 2-3. The Region also asserts that it communicated to the City the fact that it was considering withdrawing the permit after an April 29, 1993 meeting and thus its action was no surprise to the City. Region's Response, at 8. Neither of these contentions is material to our decision.

*Id.* at 3.<sup>5</sup> At the Board's request, the Region filed a response on December 10, 1993. The petition is hereby dismissed because the Region's action in withdrawing the August 16, 1990 final permit decision has mooted any issue relative to the previous permit, including the evidentiary hearing request.

## II. DISCUSSION

It is true as the City asserts that while the final permit decision was outstanding and a timely request for an evidentiary hearing request was pending, the Region had an obligation to take action on that request within 30 days of the final date for submission of a request.<sup>6</sup> The Region clearly did not meet this obligation. However, while the regulations contemplate a decision by the Regional Administrator within 30 days, the regulations do not specify a particular consequence of failure to act within that timeframe. *See In re City and County of San Francisco (Oceanside Wastewater Treatment Facility & Southwest Ocean Outfall)*, NPDES Appeal No. 91-8, at 31 (EAB, Mar. 24, 1993).

In this instance, however, the subject permit has been withdrawn pursuant to 40 C.F.R. § 124.60(b). That provision allows withdrawal "any time prior to rendering of an initial decision in a formal hearing on a permit." Thus, this withdrawal was clearly authorized by the rules rather than in contravention of them.

While we appreciate the City's evident frustration, it is unclear how the Board could provide any meaningful relief to the City by acting upon its request for a hearing on a withdrawn permit. The withdrawal of the subject permit clearly moots any request for an evidentiary hearing on it. (This mootness is not the same as a denial for purposes of 40 C.F.R. § 124.91). In addition, since the comment period on the new draft permit has already closed, the alleged prejudice that the City claims in having to resubmit comments and data can no longer be avoided. At this point, it would be better to allow the Region to focus on expeditiously completing action on the pending permit decision.

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<sup>5</sup> Since the terms of the contested permit never became effective and the City has continued to operate under the terms of the 1987 permit (Region's Response, at 9), the City has not attempted to argue that it has been prejudiced by having to comply with the contested permit terms.

<sup>6</sup> See 40 C.F.R. § 124.75(a)(1), which provides in part:

Within 30 days following the expiration of the time allowed by § 124.74 for submitting an evidentiary hearing request, the Regional Administrator shall decide the extent to which, if at all, the request shall be granted \* \* \*.

**CITY OF PORT ST. JOE, FLORIDA**

In any event, since there is no final permit decision currently in effect, the Board has no jurisdiction to hear this appeal. As the Board has recently stated:

This Board's jurisdiction to review permit decisions under the federal Clean Water Act depends on the existence of an EPA-issued permit. *See generally* 40 C.F.R. Part 124, Subpart E ("Evidentiary Hearings for EPA-Issued NPDES Permits"), and Section 124.74 therein. Here, there is no longer an EPA permit for the Board to review. When L-P withdrew its federal permit renewal application, our authority to review the contents of that permit ended.

*In re Simpson Paper Company and Louisiana-Pacific Corporation*, NPDES Appeal No. 92-26, at 6 (EAB, Aug. 6, 1993). While in this case the withdrawal of the permit came at the initiation of the Region rather than the permittee, the principle remains the same.

Once the Region issues a final permit decision on the outstanding draft permit,<sup>7</sup> the City will obviously be free to request an evidentiary hearing on this decision. We would certainly expect the Region to respond to any such request with proper diligence. This will allow the Region to address any issues raised by such request in the first instance, as contemplated by the regulations, with an opportunity for an appeal to the Board if the City is dissatisfied with the Region's response.

### III. CONCLUSION

For the reasons discussed in this Order, the petition for review is hereby dismissed.

So ordered.

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<sup>7</sup> Nothing in the administrative record before us indicates the status of permit issuance beyond the extension of the comment period until November 30, 1993.